Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
Petition for Rulemaking to Amend	)	
the Commission's Rules Governing	)	MB Docket No. 10-71
Retransmission Consent	)	

To: The Commission

JOINT COMMENTS OF BROADCAST TELEVISION LICENSEES

Broadcasting Licenses, Limited Partnership, Eagle Creek Broadcasting of Laredo, LLC, Mountain Licenses, L.P., Sarkes Tarzian, Inc., Stainless Broadcasting, L.P., and WSBS Licensing, Inc. ("Broadcast Television Licensees"),[1] by their attorneys, hereby comment on the "Petition for Rulemaking" ("Petition") submitted to the Commission on March 9, 2010 by a group comprised primarily of prominent multichannel video programming distributors ("the MVPDs").[2] Seeking to capitalize on recent publicity about several high-profile retransmission consent negotiations,[3] the MVPDs, a group which includes Time Warner Cable, Inc., Cablevision Systems Corp., DISH Network, LLC, DIRECTV Inc., and Verizon, are asking the

[1] In the aggregate, Broadcast Television Licensees are authorized to operate eight full-power commercial television broadcast stations in communities ranging from Chattanooga, Tennessee to Medford, Oregon to Key West, Florida.

[2] By Order, DA 10-594, released April 2, 2010, the Commission extended the date for filing comments on the Petition to today, May 18, 2010.

[3] *See* Brian Stelter and Brooks Barnes, *No Deal on ABC Is Reached by Disney and Cablevision*, N.Y. Times, Mar. 7, 2010, *available at* http://www.nytimes.com/2010/03/07/business/media/07abc.html; *Mediacom, Sinclair Reach TV Programming Contract*, Wall St. J., Jan. 7, 2010, *available at* http://online.wsj.com/article/SB10001424052748704854904574644443210090358.html; Brian Stelter, *News Corp. Says Deal on Fox Signal Is Unlikely*, N.Y. Times, Dec. 30, 2009, *available at* http://www.nytimes.com/2009/12/31/business/media/31cable.html.

FCC to: (i) implement new retransmission consent dispute resolution mechanisms, such as compulsory arbitration or a newly constituted expert tribunal, and (ii) mandate interim MVPD carriage of broadcast signals for the duration of retransmission consent disputes. Broadcast Television Licensees strongly oppose the MVPDs' request for the reasons set forth below.

I. Section 325(b)(1)(A) of the Communications Act Precludes Grant of the MVPDs' Requested Relief.

At the outset, Broadcast Television Licenses emphasize that there is a very short, compelling and complete answer to the Petition: the FCC lacks the statutory authority to grant the Petition's requested relief.

After seeding clouds of rhetoric in its first 30 pages, the Petition primarily asks the Commission to do two things: (i) introduce into the retransmission consent process new "dispute resolution mechanisms," such as compulsory arbitration or a new "expert tribunal" of undefined contours and composition, mechanisms that would be deployed whenever MVPDs declare that retransmission consent negotiations have "broken down" (Pet. at 32-33); and (ii) mandate "interim" carriage of broadcast signals by MVPDs for the duration of any retransmission consent dispute resolution process. Pet. at 36-37. The Commission is flatly precluded by the express language of the Communications Act from pursuing either avenue of "relief."

Section 325 of the Communications Act, as amended, and related provisions, establish a structure in which, every three years, broadcasters elect either retransmission consent or "must-carry" by MVPDs. *See also* 47 U.S.C. §§ 534, 338. Under this statutory framework, broadcasters make an independent decision every three years whether to elect assured MVPD carriage (without compensation) pursuant to must-carry or to test the waters by choosing

retransmission consent, with no guarantee of carriage but the possibility of receiving compensation from an MVPD in return for providing consent to signal carriage. If a broadcaster chooses must-carry, 47 U.S.C. §§ 325(b)(1)(B) and (C) confer on the relevant MVPD the right to retransmit that broadcaster's signal. If a broadcaster elects to proceed down the retransmission consent path, however, that broadcaster's consent to carriage then becomes the statutory key. In that case, 47 U.S.C. § 325(b)(1)(A), expressly prohibits MVPDs from retransmitting "the signal of a broadcasting station, or any part thereof, *except – with the express authority of the originating station*" (emphasis added).[4] Under the retransmission consent pathway, a *broadcaster* faces the reality that if it withholds its consent, it will receive neither compensation nor the added viewership that MVPD carriage affords. But, when the retransmission consent pathway is being followed, an *MVPD's* failure to obtain a broadcaster's consent precludes that MVPD from carrying that broadcaster's signal. The statute creates no exceptions to the prohibition on MVPD carriage of a broadcaster's signal, *except* for retransmission consent and must-carry.

The MVPDs' two-pronged relief proposal asks the FCC to substantially revise this statutory scheme and create, in effect, an entirely new one, more to the MVPDs' liking. Under this new MVPD scheme, disputed retransmission consent cases would yield MVPD carriage of a broadcast signal, not as the result of a broadcaster's consent, but as a result of an arbitrator's or expert tribunal's decision, as well as FCC-mandated "interim" carriage by MVPDs during the duration of a retransmission consent dispute. This proposed scheme is plainly contrary to 47

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[4] "The law governing retransmission consent generally prohibits cable operators and other multichannel video programming distributors, such as satellite carriers, from retransmitting the signal of a commercial television station, unless the station whose signal is being transmitted consents or chooses mandatory coverage." *Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules*, Second Report and Order and First Order on Reconsideration, 20 FCC Rcd 4516, 4519 (2005) (*citing* 47 U.S.C. §§ 325(b)(1)(A) and (B)).

U.S.C. § 325(b)(1)(A), as any broadcast signal carriage on an MVPD *compelled* by arbitration or *ordered* by an "expert tribunal," as well as any FCC-*mandated* "interim" carriage after the end of a relevant three-year must-carry/retransmission consent cycle, would be accomplished without *any* broadcaster consent, implied or express. Once a broadcaster has elected retransmission consent, the statute allows for no such compulsory carriage.[5]

Under well-established principles of law, where Congress has unambiguously addressed an issue in legislation, an administrative agency must implement the expressed Congressional will and directive. In the absence of ambiguity, the plain language is "the end of the matter," eliminating all room for administrative "gloss" or interpretation. *Chevron, U.S.A., Inc. v. NRDC, Inc.,* 467 U.S. 837, 842 (1984). Such is the case here. The language of the statute is simple, direct and mandatory – in the retransmission consent context, "no" MVPD "shall" retransmit a broadcast signal "except" with the broadcaster's "consent." The FCC simply cannot accept the MVPDs' invitation to create a new system consisting of compulsory arbitration, expert tribunals, and/or FCC-mandated interim carriage in lieu of broadcaster consent.

The Petition nowhere even acknowledges, much less addresses, the preclusive effect 47 U.S.C. § 325(b)(1)(A) has on its requested relief. Instead, the Petition claims to find Commission authority for its ultimate proposals in an irrelevant statutory provision, 47 U.S.C. § 325(b)(3)(A), which concerns *rate* regulation (but has nothing to do with the issue of *carriage* in the first instance) (Pet. at 31), or more generalized statutory grants of authority to the FCC. *See, e.g.*, Pet. at 38 nn.121 & 122, *citing* 47 U.S.C. §§ 154(i) and 303(r). None of those provisions

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[5] *See also* 47 U.S.C. §§ 325(b)(2)(E) and (e) (providing satellite carriers a one-time 6-month window, now long since expired, in which to retransmit local television broadcast signals regardless of broadcaster consent, and imposing substantial penalties on satellite carriers that carry broadcast signals without such consent after expiration of that 6-month window).

confers power on the FCC that "trumps" in any way the specific preclusion embodied in 47 U.S.C. § 325(b)(1)(A). *See Fourco Glass Co. v. Tranmirra Products Corp.*, 353 U.S. 222, 228–29 (1957) ("However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.") (internal quotations and citations omitted). Equally unavailing are the MVPDs' citations both to retransmission consent-related commitments made by News Corporation in acquiring control of Hughes/DIRECTV (Pet. at 33-34), and to good-faith negotiation obligations imposed by statute on broadcasters and MVPDs (Pet. at 15). *Voluntary* undertakings made by a broadcast company in an assignment context and generalized good-faith *negotiation* obligations in no way justify or allow *compulsory* MVPD *carriage* of broadcast signals. Indeed, in the "Good Faith Order" cited by the MVPDs (*see, e.g.*, Pet. at 15 n.46), the Commission made clear that 47 U.S.C. § 325(b)(1) expressly foreclosed FCC mandated interim relief as proposed a decade ago by certain MVPDs. *See Implementation of the Satellite Home Viewer Improvement Act of 1999*; *Retransmission Consent Issues*: *Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd. 5445, 5471 (2000). The quite similar proposal made now again by the Petition fares no better.

For all of the foregoing reasons, the Petition must be summarily dismissed.

II. The Petition Fails to Establish a Factual Basis for its Requested Relief; the Emerging Retransmission Consent Marketplace is Only Now Beginning to Find Its Footing.

Even if the FCC were not precluded by 47 U.S.C. § 325(b)(1)(A) and related provisions from adopting the relief the Petition requests, the Petition fails to establish a factual predicate for

that relief. The Petition simply does not demonstrate that there is any problem to remediate, much less one widespread enough to require extraordinary government intervention at this time. Indeed, the Petition is largely divorced from fact, filled with hyperbolic, heavily freighted verbiage that does little, if anything, to give the Commission an accurate picture of the current status of retransmission consent negotiations between MVPDs and television broadcasters. To the MVPDs, the retransmission consent landscape is characterized by "pervasive [broadcaster] brinksmanship" (Pet. at 31) and "windfall profits for broadcast licensees" (*id.* at 3) gained by "extracting cash compensation" from MVPDs (*id.* at 14) in a way that "harm[s] consumers" (*id.* at 20). The reality is far different.

The MVPDs *are* correct that an MVPD universe dominated at the time of the 1992 Act[6] by cable monopolists has now become more competitive through the steady emergence of satellite companies DISH and DIRECTV and wireless companies like Verizon. But the MVPDs could not be more wrong about how broadcasters' retransmission consent rights and the negotiations that transpire around them fit into that overall competitive balance.

MVPD attempts to portray broadcasters as abusing what MVPDs characterize as the unfair, outsized, Congressionally-conferred leverage they supposedly hold over MVPDs, holding consumers hostage along the way, are, at best, fanciful. In fact, with the advent of competition over the last several years between and among MVPDs, a true marketplace for broadcasters' retransmission consent rights has been emerging for the first time. So long as a cable monopolist was the only multichannel "game in town," there was no "marketplace" in which a broadcaster could operate. A monopolist which refuses to compensate a broadcaster for the right to carry its

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[6] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992).

signal knows that it leaves the broadcaster with nowhere else to go. For this reason, cash compensation to broadcasters was virtually non-existent for many years after passage of the 1992 Act. Now, the MVPDs are simply unhappy that this newly emergent marketplace no longer allows a particular MVPD, no matter its size, to avoid paying what is only now beginning to approach a fair price for the popular broadcast programming fare that helps drive MVPD revenues. In fact, the emergence of an actual marketplace for broadcast signals is cause for regulatory celebration, not alarm.

Notwithstanding the MVPDs' demands for immediate government intervention,[7] which are based on a few isolated disputes that involved the potential for temporary loss of a single channel of programming in certain markets, the reality is that the emerging retransmission consent marketplace is only now, nearly two decades after passage of the 1992 Act, beginning to find its footing. Cash payments are no longer flowing only to non-broadcast program suppliers. For the first time, broadcasters are beginning to receive some payment for the extraordinary relative value their signals provide in the multichannel MVPD universe. Historically, grossly disproportionate cash payments have flowed to MVPD-only programmers whose programs have attracted only fractions of the viewership delivered by broadcast stations.[8] The proper allocation

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[7] The position taken in this proceeding by the MVPDs, many of which are gargantuan in size (*e.g.*, Verizon, $107.8 billion in 2009 revenues; Time Warner, $17.8 billion in 2009 revenues), is totally inconsistent with MVPD positions taken before the FCC in other proceedings. *See, e.g.*, *Comcast Corp. v. FCC*, 600 F.3d 642 (2010) (arguing that the Commission may act only pursuant to *specific* delegated authority). The FCC should follow the "only pursuant to express authority" argument elsewhere advocated by MVPDs.

[8] For example, ESPN reportedly receives, on average, $4.10 per month per subscriber. Brian Stelter, *Next Up on Cable TV, Higher Bill for Consumers*, N.Y. Times, Jan. 4, 2010, *available at* http://www.nytimes.com/2010/01/04/business/media/04cable.html. Yet, in an average week, ESPN has far fewer primetime viewers than broadcast networks or their affiliates, which reportedly receive a far lower monetary payment. *Compare* Bill Gorman, *TNT Again Slam Dunks Weekly Cable Ratings*, TVbytheNumbers.com, May 11, 2010, *available at* http://tvbythenumbers.com/2010/05/11/tnt-again-slam-dunks-weekly-cable-ratings/50944

of MVPD revenues among the various program suppliers who provide MVPDs their programming lifeblood can only redound to the benefit of the public by helping to fund more and better quality programming from broadcasters, the segment of the video industry most closely aligned with the public and the public interest. *See* Pet. at 19 (citing the "'must have' nature" of certain broadcast programming) and 34 (citing "the public's reliance on broadcast television").

The comparatively few disputes that have emboldened the MVPDs to seek this relief are nothing more than the minor bumps and normal adjustments that are to be expected in a newly emergent marketplace.[9] Even these disputes are typically quite brief in duration and often entail market-based, voluntary extensions of MVPD signal carriage and other short-term solutions. *See Chairman Julius Genachowski Statement on Retransmission Disputes*, FCC News Release (Dec. 31, 2009) (commending Sinclair and Mediacom for agreeing to an 8-day extension of their retransmission consent agreement); *William T. Lake, Chief, Media Bureau, Statement on Retransmission Dispute*, FCC News Release (Dec. 31, 2009) (same). Broadcasters, after all, are

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(showing ESPN had 1.895 million prime-time average viewers for the week of May 3-9, 2010), *with* Bill Gorman, *ABC Catches NBC In All Major Ratings Categories For The Season*, TVbytheNumbers.com, May 4, 2010, *available at* http://tvbythenumbers.com/2010/05/04/abc-catches-nbc-in-all-major-ratings-categories-for-the-season/50580 (showing primetime average viewership ranging from 8.41 million for ABC, to 11.89 million for CBS, from Sept. 21, 2009 through May 2, 2010).

[9] Reliance on marketplace forces lies at the heart of retransmission consent. Such an approach is entirely consonant with numerous FCC policies in other contexts. *See, e.g., Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Third Report, 17 FCC Rcd 2844 (2002) (marketplace forces, not regulation, determine production and availability of advanced telecommunications services); *The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, Report and Order, 98 FCC 2d 1076 (1984) (marketplace forces, not regulation, determine the level of non-entertainment programming provided by local broadcasters). The relief sought by the MVPDs is plainly designed to artificially disrupt the marketplace and undermine, if not eliminate, broadcaster's primary marketplace leverage.

constrained by their own marketplace incentives to secure the broadest possible MVPD carriage. But in no event do the scattered and skewed, anecdotal "facts" relied on by the MVPDs, even if 47 U.S.C. § 325(b)(1)(A) did not stand in the way, justify the FCC's even beginning to think about devising some means of extraordinary intervention in, and interference with, this emergent marketplace. MVPD unhappiness with new marketplace realities they have managed to avoid for years does not constitute a problem in need of government remediation, nor does it provide any basis for sound public policy decisions.[10]

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[10] The FCC adopted its existing retransmission consent rules in accordance with Section 325(b) of the Act and pursuant to proper notice and comment rule making procedures. *See, e.g.*, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd. 2965 (1993); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Memorandum Opinion and Order, 9 FCC Rcd. 6723 (1994). Since adopting those rules, the FCC has on other occasions rejected efforts to preempt the retransmission consent process. *See, e.g.*, *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 47 (2007) (declining Mediacom's invitation to become involved in a retransmission consent dispute that "at bottom, arises from a fundamental disagreement between the parties over the appropriate valuation of [broadcast] signals. Such disagreements, without more, however, are not indicative of a lack of good faith. Even with good faith, impasse is possible.").

CONCLUSION

47 U.S.C. § 325(b)(1)(A) precludes Commission grant of the Petition's requested relief. The Petition is otherwise factually infirm. It should be summarily dismissed.

Respectfully submitted,

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